

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the  
Supreme Court of Georgia

**BRIEF *AMICUS CURIAE* ON BEHALF  
OF THE MILITARY COALITION  
IN SUPPORT OF PETITIONER**

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**QUESTIONS PRESENTED**

1. Whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity?
2. Whether a state may collect taxes from its citizens in violation of the Constitution, provide a right to refunds for the unconstitutional taxation, and then eliminate the right to refunds after the time has passed for any other relief?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
REASONS FOR GRANTING THE WRIT .....	2
CONCLUSION .....	13
APPENDIX A .....	1a
APPENDIX B .....	8a

## TABLE OF AUTHORITIES

## CASES:

	Page
<i>Atchison, T. &amp; S.F. R. Co. v. O'Connor</i> , 223 U.S. 280 (1912) .....	3, 6, 7
<i>Barker v. Kansas</i> , No. 91-611, <i>rev'd</i> , 112 S. Ct. 1619 (1992) .....	3, 4
<i>Bass v. South Carolina</i> , No. 91-1697, <i>cert. granted and judgment vacated</i> , 113 S. Ct. 3025 (1993) ....	3
<i>Bohn v. Waddell</i> , No. 92-1748, <i>cert. denied</i> , 113 S. Ct. 3000 (1993) .....	3
<i>Brinkerhoff-Faris Trust &amp; Sav. Co. v. Hill</i> , 281 U.S. 673 (1930) .....	10-11
<i>Brumley v. Utah State Tax Comm'n</i> , No. 910242, 1993 WL 333583 (Utah, Sept. 2, 1993) .....	4-5
<i>Collins v. Waldron</i> , 259 Ga. 582, 385 S.E.2d 74 (1989) .....	6, 10, 11
<i>Colorado v. Kuhn</i> , No. 91-980, <i>cert. dismissed</i> , 112 S. Ct. 1925 (1992) .....	3
<i>Cooper v. Aaron</i> , 358 U.S. 1 (1958) .....	13
<i>Davis v. Michigan Dep't of Treasury</i> , 489 U.S. 803 (1989) .....	<i>passim</i>
<i>Duffy v. Wetzler</i> , No. 92-521, <i>cert. granted and judgment vacated</i> , 113 S. Ct. 3027 (1993) .....	3, 4
<i>Gossum v. Commonwealth of Kentucky Revenue Cabinet</i> , 92-SC-1041-T, Kentucky Supreme Court .....	4
<i>Green v. Mansour</i> , 474 U.S. 64 (1985) .....	9
<i>Hagge v. Iowa State Dep't of Revenue and Fin.</i> , 504 N.W.2d 448 (Iowa 1993) .....	4, 11
<i>Harper v. Virginia Dep't of Taxation</i> , — U.S. —, 118 S. Ct. 2510 (1993) .....	<i>passim</i>
<i>Hathorn v. Lovorn</i> , 457 U.S. 255 (1982) .....	10
<i>Henderson v. Carter</i> , 229 Ga. 876, 195 S.E.2d 4 (1972) .....	11
<i>Henry v. City of Rock Hill</i> , 376 U.S. 776 (1964) ....	6
<i>James B. Beam Distilling Co. v. Georgia</i> , 501 U.S. —, 111 S. Ct. 2439 (1991), <i>appeal after remand</i> , 1993 WL 503244 (Ga. 1993) .....	4
<i>McKesson Corp. v. Division of Alcoholic Beverages and Tobacco</i> , 496 U.S. 18 (1990) .....	<i>passim</i>

## TABLE OF AUTHORITIES—Continued

	Page
<i>McKnott v. St. Louis &amp; S.F. Ry. Co.</i> , 292 U.S. 230 (1934) .....	9
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958) .....	10
<i>Nashville, Charlotte &amp; St. L. Ry. v. Browning</i> , 310 U.S. 362 (1940) .....	10
<i>National Can Corp. v. Washington Dep't of Revenue</i> , 109 Wash. 2d 878, 749 P.2d 1286, <i>cert. denied</i> , 486 U.S. 1040 (1988) .....	5
<i>Norwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue</i> , No. 91-2047, <i>cert. granted and judgment vacated</i> , 113 S. Ct. 3026 (1993) .....	3, 4
<i>Pledger v. Bosnick</i> , No. 91-375, <i>cert. denied</i> , 113 S. Ct. 3034 (1993) .....	3
<i>Reich v. Collins</i> , No. 92-1276, <i>cert. granted and judgment vacated</i> , 113 S. Ct. 3028 (1993) .....	3
<i>Robinson v. City of Seattle</i> , 119 Wash. 2d 34, 830 P.2d 318, <i>cert. denied</i> , 113 S. Ct. 676 (1992) .....	5
<i>Service Oil, Inc. v. North Dakota</i> , 479 N.W.2d 815 (N.D. 1992) .....	11
<i>Sheehy v. Montana Dep't of Revenue</i> , No. 91-1473, <i>cert. granted and judgment vacated</i> , 113 S. Ct. 3025 (1993) .....	3
<i>Strelecki v. Oklahoma Tax Comm'n</i> , No. 77,615, 1993 WL 379008 (Okla., Sept. 28, 1993) .....	5, 12
<i>Swanson v. North Carolina</i> , No. 91-1436, <i>cert. granted and judgment vacated</i> , 113 S. Ct. 3025 (1993) .....	3, 4
<i>United States v. City of Spokane</i> , 918 F.2d 84 (9th Cir. 1990), <i>cert. denied</i> , — U.S. —, 111 S. Ct. 2888 (1991) .....	9
<i>Waldron v. Collins</i> , 788 F.2d 736 (11th Cir.), <i>cert. denied</i> , 479 U.S. 884 (1986) .....	6
<i>Winstead v. Marz</i> , Nos. 91-CC-422, 91-CC-474, 91-CC-475, 91-CC-476, Supreme Court of Mississippi .....	4
<i>Wisconsin Dep't of Revenue v. Hogan</i> , <i>petition for review pending</i> , 93-CV-2549, Circuit Court for Dane County (settlement pending) .....	4
<i>Wright v. Forrester</i> , 192 Ga. 864, 16 S.E.2d 873 (1941) .....	7, 11

## TABLE OF AUTHORITIES—Continued

STATUTES:	Page
O.C.G.A. § 48-2-35 .....	6, 9, 10, 11
O.C.G.A. § 48-2-40 .....	7
O.C.G.A. § 48-2-55 .....	7
O.C.G.A. § 48-2-81 .....	7
O.C.G.A. § 48-7-2 .....	7
O.C.G.A. § 48-7-5 .....	7
O.C.G.A. § 48-7-12a .....	8
O.C.G.A. § 48-7-86 .....	7
O.C.G.A. § 48-7-114 .....	8
O.C.G.A. § 48-7-116 .....	8
O.C.G.A. § 48-7-120(a) .....	7
O.C.G.A. § 48-16-12(b) .....	7
Tax Injunction Act, 28 U.S.C. § 1341 .....	8

## OTHER AUTHORITIES:

3 Journal of Multistate Taxation 244 (Jan. Feb. 1994) .....	5, 12
5 State Tax Notes (Tax Analysts) (Dec. 27, 1993) .....	9
7 Pepperdine Law Review 227 (1980) .....	6
241 Daily Tax Rep. (BNA) (Dec. 17, 1993) .....	9
Tax Administrators News, December, 1992 .....	5
The Albany Herald (Dec. 18, 1993) .....	9

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No. 93-908

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v. *Petitioner,*MARCUS E. COLLINS, *et al.*,  
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Supreme Court of GeorgiaBRIEF *AMICUS CURIAE* ON BEHALF  
OF THE MILITARY COALITION  
IN SUPPORT OF PETITIONERINTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 37.2 of this Court, The Military Coalition (herein "TMC") respectfully submits this brief as *amicus curiae*.<sup>1</sup> TMC is a voluntary association of 24 military-related organizations which was formed six years ago. App. A, 1a. Collectively its constituent organizations represent the interests of over 1,900,000 members, who are retired, reserve and active members of the Uniformed Services of the United States. TMC is dedicated to the purpose of providing a cohesive means for the study and advocacy of issues which impact upon the maintenance of a strong national defense and the preser-

<sup>1</sup> *Amicus* has received the written consents of the parties to the filing of this brief; those consents have been filed with the Clerk of the Court.

vation of rights and benefits its varied constituents have earned through years of dedicated service to the United States.

Despite this Court's unequivocal mandates in *Harper v. Virginia Dep't of Taxation*, 509 U.S. —, 113 S. Ct. 2510 (1993), and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), the State of Georgia and approximately seven other states continue to refuse to give effect to this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), as the controlling statement of federal law. The resolution of the questions presented in this case is vitally important to *amicus*. If the decision below is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be arbitrarily abridged by any state solely on the basis of local political considerations. *Amicus* has supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. Thus, *amicus* has a unique perspective on the questions presented by this case as well as a vital interest in its proper resolution.

#### REASONS FOR GRANTING THE WRIT

This case raises questions of substantial public importance concerning the propriety of states retaining taxes collected in violation of the Constitution and statutes of the United States. This case represents a variation of the recurring theme of the states denying federal rights by denying citizens a remedy for the states' violation of federal rights. Specifically, this case presents the interrelated questions of whether a state court may change a state's remedial rules after the tax has been collected by creating a remedial scheme that is wholly illusory—one that results in the unlawful exaction remaining in the state treasury, while denying citizens a real opportunity to protect the federal right. Review by this Court is necessary

to resolve finally the issue of whether this Court's decisions in *Harper v. Virginia Dep't of Taxation*, — U.S. —, 113 S. Ct. 2510 (1993), *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Atchison, T. & S.F. R. Co. v. O'Connor*, 223 U.S. 280 (1912), may be subverted through the charade of state procedures which do not satisfy constitutional standards.

1. This is the *second* petition in this case and the twelfth to be filed within the last two terms challenging a state's refusal to refund taxes collected in violation of the intergovernmental tax immunity doctrine.<sup>2</sup> Several of the petitions decided last term involved the question of whether this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), may be applied non-retroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their retired pay. Now, in the wake of this Court's decision in *Harper* and its prior remand of this case, the issues presented by this petition—whether the states may deny relief under the guise of constitutionally deficient state remedies—is at the forefront of the states' continu-

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<sup>2</sup> See *Pledger v. Bosnick*, No. 91-375, cert. denied, 113 S. Ct. 3034 (1993); *Barker v. Kansas*, No. 91-611, *rev'd*, 112 S. Ct. 1619 (1992); *Harper v. Virginia Dep't of Taxation*, No. 91-794, *rev'd*, 113 S. Ct. 2510 (1993); *Colorado v. Kuhn*, No. 91-980, cert. *dismissed*, 112 S. Ct. 1925 (1992); *Swanson v. North Carolina*, No. 91-1436, cert. *granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Sheehy v. Montana Dep't of Revenue*, No. 91-1473, cert. *granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, No. 91-1697, cert. *granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Norwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue*, No. 91-2047, cert. *granted and judgment vacated*, 113 S. Ct. 3026 (1993); *Duffy v. Wetzel*, No. 92-521, cert. *granted and judgment vacated*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, No. 92-1276, cert. *granted and judgment vacated*, 113 S. Ct. 3028 (1993); and *Bohn v. Waddell*, No. 92-1748, cert. *denied*, 113 S. Ct. 3000 (1993).

ing refusal to recognize this Court's decisions as the "controlling statement of federal law." *Harper*, 113 S. Ct. at 2515. This issue is currently being raised by the states upon remand in the *Davis*-related cases of *Harper, supra*, *Duffy, supra*, *Swanson, supra*, and *Barker, supra*.<sup>3</sup> In addition, identical issues are currently pending before the Minnesota Supreme Court upon remand in *Norwest Bank Duluth, N.A., supra*.<sup>4</sup> Finally, an analogous approach has also been successfully asserted by the respondents in *Beam* upon remand to nullify this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. —, 111 S. Ct. 2439 (1991). See *James B. Beam Distilling Co. v. Georgia*, 1993 WL 503244 (Ga., Dec. 2, 1993).

In contrast to the decision here, three state courts of last resort have rejected efforts to date by the states of Iowa, Utah, and Oklahoma to nullify this Court's decisions in *Davis, supra*, *McKesson, supra*, and *Harper, supra*. See *Hagge v. Iowa Dep't of Revenue and Fin.*, 504 N.W.2d 448 (Iowa 1993); *Brumley v. Utah State Tax Comm'n*, No. 910242, 1993 WL 333583 (Utah, Sept. 2,

<sup>3</sup> The positions of the states are disingenuous. For example, in *Barker* the State conceded during oral argument that a decision by this Court in favor of military retirees would obligate it to refund 91 million dollars to the members of the certified class. (Official Transcript, March 3, 1992, p. 38-39). The State also acknowledged that there was no protest requirement conditioning the right to refunds in Kansas and that this Court's decision in *Barker* would govern all members of the class. *Id.* at 39-40. Yet, on remand, the state of Kansas is now attempting to play the same game that Georgia has played here. See *Barker v. Kansas*, District Court of Shawnee County, Kansas Division Four, No.: 89-CV-666 and 1100 (consolidated), Defendants' Motion to Dismiss Plaintiffs' Claims for Income Tax Refunds, dated Dec. 1, 1992.

<sup>4</sup> Identical issues are pending in the *Davis*-related cases of *Wisconsin Dep't of Revenue v. Hogan*, petition for review pending, 93-CV-2549, Circuit Court for Dane County (settlement pending); *Winstead v. Marz*, Nos. 91-CC-422, 91-CC-474, 91-CC-475, 91-CC-476, Supreme Court of Mississippi; and *Goosum v. Commonwealth of Kentucky Revenue Cabinet*, 92-SC-1041-T, Kentucky Supreme Court.

1993); *Strelecki v. Oklahoma Tax Comm'n*, No. 77,615, 1993 WL 379008 (Okla., Sept. 28, 1993). However, both Utah and Oklahoma have petitions for reconsideration pending.

While analytically different from the retroactivity issue resolved by this Court in *Harper*, this petition presents the same ultimate question of whether states may render the enforcement of federal rights inutile by denying citizens a remedy for the states' violations of federal rights. Until definitively ordered by this Court, state courts will continue to struggle with this issue under its new guise of constitutionally deficient state remedies.<sup>5</sup> See Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional State Taxes*, 3 *Journal of Multistate Taxation* 244 (Jan. Feb. 1994). Review by this Court is thus necessary to resolve this question of demonstrated difficulty and importance.

2. The decision of the Georgia Supreme Court conflicts with the holdings of the Court in *Harper v. Virginia Dep't of Taxation*, — U.S. —, 113 S.Ct. 2510

<sup>5</sup> In the wake of *Beam*, the states quickly realized that they could no longer rely on the prospectivity defense to defeat the enforcement of federal rights. See, e.g., *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318, 339-43, cert. denied, 113 S. Ct. 676 (1992) (following *Beam* and abolishing the rule of selective prospectivity originally announced in *National Can Corp. v. Washington Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988)). Indeed, upon the completion of briefing and oral argument before this Court in *Harper*, state taxing authorities conceded that it was unlikely that a prospectivity analysis of *Davis* was warranted. They also acknowledged that it was doubtful that *Davis* satisfied the threshold test for prospectivity. See HARPER ORAL ARGUMENT ADDRESSES TAXPAYER REMEDY, Tax Administrators News, December, 1992 at 137. However, these state authorities were also quick to point out that hope was not lost because there was now a new game: "procedural bars" to remedies. *Id.* at 144. This was so even though such positions were "meritless." See, e.g., *Brumley v. Utah State Tax Comm'n, supra*; *Strelecki v. Oklahoma Tax Comm'n, supra*.

(1993); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); and *Atchinson, T. & S.F. R.-Co. v. O'Connor*, 223 U.S. 280 (1912). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of these landmark decisions of this Court.

This Court's mandate in *Reich I* required the Georgia Supreme Court to re-examine its decision. *See Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). However, the Georgia Supreme Court continues to be "a little too slow to recognize the implied duress under which payment is made." *O'Connor*, 223 U.S. at 286.<sup>6</sup> In addition, the Supreme Court of Georgia has been "too slow to recognize" the chameleon-like tactics of the respondents in this case. It has simply adopted what "the home crowd wants" as the decision in this case. *See Rehnquist, Act Well Your Part: Therein All Honor Lies*, 7 Pepperdine Law Review 227, 230 (1980). In rendering the decision below, the Georgia Supreme Court ignored that the respondents have previously prevailed in establishing that federal retirees, including the petitioner in this case, were not entitled to injunctive relief because the Georgia refund statute, O.C.G.A. § 48-2-35 (Pet. App. G at 1G), provided an adequate remedy at law in this case. *See Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989) ("[T]he refund statute (O.C.G.A. § 48-2-35) provides an adequate remedy for any vestigial, disparity.").<sup>7</sup>

<sup>6</sup> Indeed, as ably demonstrated in the dissent below, the Georgia Supreme Court's unsupported conclusion that Georgia's law satisfies federal due process cannot withstand scrutiny. Pet. at 6a-14a.

<sup>7</sup> See, e.g., Brief for Petitioners at 16-17 ("Brief of Appellants"), *Collins v. Waldron*, No. 47018, *supra*. In addition, the Court below also ignored that long before *Davis*, Georgia federal retirees were denied access to federal court because, *inter alia*, the respondents had established that an action for refund under O.C.G.A. § 48-2-35 was an adequate remedy. *See Waldron v. Collins*, 788 F.2d 736 (11th Cir.), cert. denied, 479 U.S. 884 (1986).

The Georgia Supreme Court's holding in this case that the availability of a declaratory judgment action satisfies the requirements of due process and excuses the state's obligation to provide retroactive relief is untenable. It is indisputable that Georgia has established a comprehensive scheme of sanctions, summary remedies and criminal penalties which are designed "to prompt" taxpayers to pay their taxes before their objections are entertained. *Harper*, 113 S. Ct. at 2519, 2520 n.10.<sup>8</sup> The holding of the Georgia Supreme Court is directly contrary to the holdings of the Court in both *McKesson* and *O'Connor*.

In *O'Connor*, Colorado asserted that the taxpayer was not entitled to a return of the taxes because "[t]he plaintiff could have enjoined any effort to enforce the collection of the tax." *O'Connor*, 223 U.S. at 284. The Court held that this was inadequate because the taxpayer "could have had no certainty of ultimate success" and was not required "to take the risk" of not prevailing. *Id.* at 286. In *McKesson*, the taxpayer was awarded "declaratory and injunctive relief against continued enforcement of the discriminatory provisions." *McKesson*, 496 U.S. at 31. However, the Court held that this relief alone was inadequate to satisfy "the requirements of federal law." *Id.* Because Florida "penaliz[ed] taxpayers for failure to remit their

<sup>8</sup> The financial sanctions include, e.g., a failure to *prepay* penalty at the rate of 9% per annum, a penalty equal to 25% of the tax and additional interest at the rate of 12% per annum. *See O.C.G.A. §§ 48-7-120(a), 48-7-86, 48-2-40*, App. B at 14a, 12a, 8a. Georgia also has a variety of summary remedies for the collection of unpaid taxes, including attachment, garnishment and levy. *See O.C.G.A. § 48-2-55*, App. B at 16a. Georgia also imposes criminal sanctions on a delinquent taxpayer. *See O.C.G.A. §§ 48-7-2, 48-7-5, 48-16-12(b)*, App. B at 9a, 10a, 16a. In addition, tax officials and law enforcement officers in Georgia are *obligated*, by statute, to prosecute any taxpayer who fails to pay his taxes when due. *See O.C.G.A. § 48-2-81*. *See also Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (taxpayer faced with threat of criminal prosecution despite pending objection to the validity of the tax).

taxes in a timely fashion," the due process clause mandated retroactive relief. *Id.* at 51. Therefore, even if the petitioner could have obtained declaratory relief here, that alone would not have satisfied "the requirements of federal law." *Id.* at 31.<sup>9</sup> Because Georgia has established "'various sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payments before their objections are entertained or resolved'", it must provide retroactive relief. *Harper*, 113 S. Ct. at 2519-20 n.10.<sup>10</sup>

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioner, are relegated exclusively to state courts to press their claims for refunds. But it is state courts that have demonstrated the greatest difficulty in applying the Fourteenth Amendment. This Court is the only federal court that can hear the retirees' claims. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions to all federal retirees and, indeed, all state taxpayers. Absent review by this Court, "[t]he State too easily avoids its responsibilities and . . . go[es] its way unimpeded and unburdened with any remedy for those who have been wronged during the period of [Georgia's] noncompliance with federal law."

<sup>9</sup> However, no such remedy existed. The Attorney General for Georgia should be embarrassed to recall that at his urging, all members of the federal retiree class, including the petitioner, were denied this relief for tax year 1988.

<sup>10</sup> Indeed, the availability of declaratory relief under Georgia's scheme is meaningless because a taxpayer is subject to constitutional duress before such a proceeding could have even been commenced. The Georgia personal income tax law not only imposes sanctions for taxpayers who fail to pay their taxes when due, but the law requires taxpayers to *prepay* their liability in the first instance. *See* O.C.G.A. §§ 48-7-114, 48-7-115, App. B at 13a-14a. A taxpayer who fails to meet this prepayment requirement is liable for a penalty. *See* O.C.G.A. § 48-7-120(a), App. B at 14a. Thus, in the first instance, it is impossible for the Georgia scheme as construed by the Georgia Supreme Court to satisfy due process.

*Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).<sup>11</sup>

3. The result reached by the Supreme Court of Georgia also discriminates based on the origin of the petitioner's claims. In Georgia, taxpayers seeking to enforce rights secured under state law are assured a clear and certain judicial remedy to obtain refunds under O.C.G.A. § 48-2-35. Pet. at App. 1G. This clear and certain remedy is available whether the tax sought to be refunded has been paid with or without protest and is available irrespective of whether predeprivation remedies were invoked by the taxpayer. *See* O.C.G.A. § 48-2-35, Pet. at App. 1G.

The clarity of this right was again recently demonstrated in the wake of the Georgia Supreme Court's decision in this case. On December 14, 1993, Governor Zell Miller announced that the state will refund \$38 million in sales tax imposed upon the private, casual sales of vehicles by individuals. This decision was in response to a Georgia Superior Court ruling which had held that the tax was invalid under Georgia law. *See* 241 Daily Tax Rep. (BNA) at H-2 (Dec. 17, 1993); 5 State Tax Notes (Tax Analysts) at 1531 (Dec. 27, 1993). These refunds are to be paid with statutory interest. *See* "Tax cut to end 'business as usual'", The Albany Herald at 1A (Dec. 18, 1993).

A state remedial scheme that provides a clear and certain remedy for claims based on state law but denies that right to taxpayers seeking to enforce constitutional rights is unconstitutional. *See McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 234 (1934) ("A state may

<sup>11</sup> In stark contrast to the decision below, in those rare circumstances where federal courts have been able to exercise jurisdiction, there has been no difficulty in providing taxpayer relief for unconstitutional state taxes. *See, e.g., United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), cert. denied, — U.S. —, 111 S. Ct. 2888 (1991).

not discriminate against rights arising under federal laws."). *Cf. Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958).

4. In denying the petitioner refund relief for taxes collected in violation of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), the court below refused to give effect to the settled practice of the respondents<sup>12</sup> and the court's own prior decisions regarding the refund statute of O.C.G.A. § 48-2-35. *See, e.g., Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989) ("Even so, the refund statute (O.C.G.A. § 48-2-35) provides [federal retirees] an adequate remedy for any vestigial, disparity.") As a result of the decision below, the Supreme Court of Georgia cut off the petitioner's existing remedy under the refund statute. This result conflicts with the decisions of this Court.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), the Court held that the state court violated the Due Process Clause by judicially depriving the taxpayer of all available remedies for challenging the validity of a tax. Specifically, the Court held that a tax-

<sup>12</sup> "Settled state practice" evidences state law. As the Court explained in *Nashville, Charlotte & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940):

It would be a narrow conception of jurisprudence to confine the notion of "law" to what is found written on the statute books, and to disregard the gloss which life has written upon it. *Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law.* The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, . . . are often . . . truer law than the dead words of the written text.

(emphasis added). *See, e.g.*, statement of Amelia W. Baker, Esq., Assistant Attorney General of Georgia, to the Court in *Beam*: "There is no requirement for a protest in Georgia. The refund statute does not require a protest." Official Transcript, October 30, 1990, p. 31.

payer has a property interest in a remedy procedure, and this property interest is protected by the Due Process Clause:

Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

*Id.* at 682 (footnote and citations omitted).

The petitioner here is in precisely the same situation as the taxpayer in *Brinkerhoff-Faris*. At the time he elected to pursue the refund remedy under O.C.G.A. § 48-2-35, it was settled law that refunds were available in the situation at issue in this case. *Collins v. Waldron*, 385 S.E.2d at 75 n.1; *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972); *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941). Therefore, he had a property interest in the remedy elected—refunds pursuant to O.C.G.A. § 48-2-35—and the decision of the Georgia Supreme Court extinguishing that right at a time when petitioner had no other remedy available violated the Due Process Clause. *Brinkerhoff-Faris*, 281 U.S. at 682. Thus, this Court should grant the petition and reverse the decision below.

5. Review by this Court is also necessary to resolve the conflict among the state courts of last resort regarding what is sufficient to satisfy the minimum requirements of federal due process. Contrary to the decision below, the Supreme Court of North Dakota has held that refunds were required under *McKesson* despite the availability of a declaratory judgment proceeding in light of the financial sanctions available to the state. *See Service Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992). Similarly, in the post-*Harper Davis*-related case of *Hagge v. Iowa Dep't of Revenue & Fin.*, 504 N.W.2d 448 (Iowa 1993), the Iowa Department of Revenue advanced an

argument identical to the one asserted here by the respondents. The Supreme Court of Iowa rejected Iowa's argument and awarded full refunds to federal retirees: "we are convinced that, by *McKesson* standards, tax payment in Iowa continues to be less 'voluntary' than 'under duress'" *Id.* at 451 (citation omitted).<sup>13</sup>

Similar to the arguments of the respondents adopted by the court below, the Oklahoma Tax Commission in the *Davis*-related *Strelecki* case asserted that the Oklahoma refund statute need not be applied because there were other possible pre-deprivation remedies the taxpayers could have invoked. The Oklahoma Supreme Court categorically rejected these arguments on both state and federal due process grounds. *See Strelecki v. Oklahoma Tax Comm'n*, No. 77,615, 1993 WL 379008 (Okla., Sept. 28, 1993).

As the result of this conflict, taxpayers throughout the country remain unsure of what they must do to preserve their rights to relief from unconstitutional state taxation. As one prominent tax commentator recently observed:

*Harper* answered only some of the questions taxpayers are asking in their attempts to secure refunds of unconstitutional taxes. A complete understanding of what is required is still several court decisions away, including the issue of appropriate remedies presented by *Harper* itself.

Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional State Taxes*, 3 *Journal of Multistate Taxation* 244, 247 (Jan. Feb. 1994). Absent further guidance from this Court that the time for tolera-

<sup>13</sup> The court in *Hagge* specifically held that "[a]lthough the department argues strenuously that Hagge could have long ago brought suit under Iowa Rules of Civil Procedure 261 and 266 to enjoin the unconstitutional collection of state income tax on his federal pension, we seriously question whether such process would qualify as "meaningful" under a *McKesson* analysis." *Id.* at 450 (emphasis added).

tion of the states' chameleon-like tactics has come to an end, no citizen will be able to enforce his or her right to relief from unconstitutional state taxation. Amicus respectfully submits that a complete understanding of what is required can be finally laid to rest by the grant of the petition in this case.

Amicus respectfully urges this Court to grant the petition and reverse the decision below. Absent such review, the states will continue their efforts to annul the judgments of this Court. If these state efforts go unchecked, "the constitution itself [will] become[] a solemn mockery . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citation omitted).

#### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Georgia should be granted and its decision reversed.

Respectfully submitted,

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January 6, 1994

## **APPENDICES**

**APPENDIX A****MEMBERS OF THE MILITARY COALITION****THE RETIRED OFFICERS ASSOCIATION (TROA)**

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

**AIR FORCE ASSOCIATION (AFA)**

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

**AIR FORCE SERGEANTS ASSOCIATION (AFSA)**

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

**ASSOCIATION OF MILITARY SURGEONS  
OF THE UNITED STATES (AMSUS)**

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its

membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

#### **ASSOCIATION OF U.S. ARMY (AUSA)**

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

#### **CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)**

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

#### **COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)**

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The

purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

#### **ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)**

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

#### **FLEET RESERVE ASSOCIATION (FRA)**

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

#### **MARINE CORPS LEAGUE (MCL)**

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

### **MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)**

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

### **NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)**

The National Association for Uniformed Services/Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SWM membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

### **NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)**

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

### **NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)**

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Mem-

bership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform them concerning issues affecting their lives.

### **NAVAL ENLISTED RESERVE ASSOCIATION (NERA)**

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The Association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

### **NAVAL RESERVE ASSOCIATION (NRA)**

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

### **NAVY LEAGUE OF THE UNITED STATES (NLUS)**

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

### **NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NCOA)**

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organiza-

tion operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

#### **RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)**

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the Association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

#### **THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)**

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

#### **THE MILITARY CHAPLAINS ASSOCIATION (MCA)**

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all

chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

#### **THE RETIRED ENLISTED ASSOCIATION (TREA)**

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

#### **U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)**

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

#### **U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)**

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

## APPENDIX B

EXCERPTS OF RELEVANT PORTIONS OF THE  
GEORGIA STATE STATUTES

**Sec. 48-2-40. Rate of interest on past due taxes.**—Except as otherwise expressly provided by law, taxes owed the state or any local taxing jurisdiction shall bear interest at the rate of 1 percent per month from the date the tax is due until the date the tax is paid. For the purpose of this Code section, any period of less than one month shall be considered to be one month. This Code section shall also apply to alcoholic beverage taxes.

\* \* \* \*

**Sec. 48-2-42. Nature of penalties.**—All penalties imposed by law are part of the tax and are to be collected as such. The proceedings to collect the original tax, the tax constituted from penalties imposed, and the interest shall be conducted in the same manner. Any provision of law for criminal prosecution shall not operate under the tax laws of this state to relieve any taxpayer of any tax, penalty, or interest imposed by law.

\* \* \* \*

**Sec. 48-2-56. Liens for taxes; priority.**—(a) Except as otherwise provided in this Code section, liens for all taxes due the state or any county or municipality in the state shall arise as of the time the taxes become due and unpaid and all tax liens shall cover all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid.

\* \* \* \*

(e) The lien for taxes imposed by the provisions of Article 2 of Chapter 7 of this title, relating to certain income taxes, shall:

(1) Arise and cover all property of the taxpayer as of the time a tax execution for these taxes is entered upon the general execution docket; and

(2) Not be superior to the lien of a prior recorded instrument securing a bona fide debt. Before the lien provided for in this subsection shall attach to real property it shall be recorded in the county where the real property is located.

\* \* \* \*

**Sec. 48-2-81. Duties of sheriffs, tax collectors, etc., as to collection of taxes and prosecution of violators; payment of portion of fines to informants.**—It shall be the duty of all sheriffs, deputies, and constables to enforce the collection of all taxes that may be due the state under any law. It shall be the duty of all tax collectors, tax commissioners, sheriffs, and constables to make sure that all persons violating any of the tax laws of this state are prosecuted for all such violations. One-fourth of the fines imposed upon persons convicted of violating any tax law of this state upon the information of any citizen of this state shall be paid to the informant by order of the court.

\* \* \* \*

**Sec. 48-7-2. Failure of person to pay tax, file return, keep records, etc., under this chapter; penalty.**—(a) It shall be unlawful for any person who is required under this chapter to pay any tax, make any return, keep any records, supply any information, or exhibit any books or records for the purpose of computation, assessment, or collection of any tax imposed by this chapter to fail to:

- (1) Pay the tax;
- (2) Make the return;
- (3) Keep the records; or
- (4) When requested to do so by the commissioner:
  - (A) Supply the information; or
  - (B) Exhibit the books or records.

(b) In addition to other penalties provided by law, any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor.

\* \* \* \*

**Sec. 48-7-5. Evasion of income tax, penalty, interest, or other amount in excess of \$3,000.00.**—Any person who willfully evades or defeats or willfully attempts to evade or defeat, in any manner, any income tax, penalty, interest, or other amount in excess of \$3,000.00 imposed under this chapter, including but not limited to failure to file a return or report, shall, in addition to any other criminal or civil penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000.00 in the case of an individual or not more than \$500,000.00 in the case of a corporation or imprisoned not less than one nor more than five years, or both. Conduct proscribed by this Code section shall be subject to punishment under this Code section notwithstanding the applicability to such conduct of any other provision of law.

\* \* \* \*

**Sec. 48-7-82. Periods of limitation on assessment and collection; income received during decedent's lifetime, by estate, or by corporation; omissions from gross income; collection by execution; agreements to assessments after expiration of statutory period; taxpayer's notification of commissioner of change in net income by Internal Revenue Service; assessment; effect of failure to notify.**—(a) Except as otherwise provided in this Code section, the amount of income tax imposed by this chapter shall be assessed within the time period specified in Code Section 48-2-49.

\* \* \* \*

(e)(1) When a taxpayer's amount of net income for any year under this chapter as returned to the United States Department of the Treasury is changed or cor-

rected by the commissioner of internal revenue or other officer of the United States of competent authority, the taxpayer, within 180 days after final determination of the changed or corrected net income, shall make a return to the commissioner of the changed or corrected income, and the commissioner shall make assessment or the taxpayer shall claim a refund based on the change or correction within one year from the date the return required by this paragraph is filed. If the taxpayer does not make the return reflecting the changed or corrected net income and the commissioner receives from the United States government or one of its agents a report reflecting the changed or corrected net income, the commissioner shall make assessment for taxes due based on the change or correction within five years from the date the report from the United States government or its agent is actually received.

(2) In the event the taxpayer fails to notify the commissioner of the final determination of his United States income taxes, the commissioner shall proceed to determine, upon evidence that the commissioner has brought to his attention or that he otherwise acquires, the corrected income of the taxpayer for the fiscal or calendar year. If additional tax is determined to be due, the tax shall be assessed and collected. If it is determined that there has been an overpayment of tax for the year, the taxpayer, by his failure to notify the commissioner as required in paragraph (1) of this subsection, shall forfeit his right to any refund due by reason of the change or correction. A taxpayer who so fails to notify the commissioner, however, shall be entitled to equitable recoupment of 90 percent of any overpayment so determined against any additional tax liability so determined, the remaining 10 percent of the overpayment being totally forfeited as a penalty for failure to make a return as required by paragraph (1) of this subsection.

\* \* \* \*

**Sec. 48-7-86. Penalty for failure to pay or for underpayment of taxes; rate; reductions of tax by partial payments and credits; penalty for nonpayment after notice and demand; maximum penalty; maximum additions; "underpayment" defined; penalties for underpayments due to disregard of rules or to fraud.**—(a)(1) In case of failure to pay:

(A) The amount shown as tax on a return on or before the date prescribed for payment of the tax, such date to be determined with regard to any extension of time for payment, there shall be added to the amount of tax required to be shown on the return one-half of 1 percent of the amount of the tax if the failure is for not more than one month and with an additional one-half of 1 percent for each additional month or fraction of a month during which the failure continues. For the purposes of this subparagraph, the amount of tax shown on the return shall be reduced, for the purpose of computing the addition for any month, by the amount of any part of the tax which is paid on or before the beginning of the month and by the amount of any credit against the tax which is claimed on the return;

(B) Any amount in respect of any tax required to be shown on a return which is not so shown within ten days of the date of the notice and demand for the payment, the amount of tax stated in the notice and demand shall be increased by one-half of 1 percent of the amount of the tax if the failure is for not more than one month and by an additional one-half of 1 percent for each additional month or fraction of a month during which the failure continues. For the purposes of this subparagraph, the amount of tax stated in the notice and demand shall be reduced, for the purpose of computing the addition for any month, by the amount of any part of the tax which is paid before the beginning of the month.

(2) No penalty shall be assessed pursuant to this subsection which exceeds in the aggregate 25 percent of the amount of the tax or when it is shown that the failure is due to reasonable cause and not due to willful neglect.

\* \* \* \*

(d) For purposes of subsections (e) and (f) of this Code section, the term "underpayment" means a deficiency as defined in Code Section 48-7-1.

(e) If any part of any underpayment of tax required to be shown on a return is due to a negligent, or intentional disregard of rules and regulations, but without intent to defraud, an amount equal to 5 percent of the underpayment shall be added to the tax.

(f) If any part of any underpayment of tax required to be shown on a return is due to fraud, an amount equal to 50 percent of the underpayment shall be added to the tax. This amount shall be in lieu of any amount determined under subsection (e) of this Code section. If any penalty is assessed under this subsection for an underpayment of tax which is required to be shown on a return, no penalty under Code Section 48-7-57 or subsection (a) of this Code section shall be assessed with respect to the same underpayment.

\* \* \* \*

**Sec. 48-7-114. Declaration of estimated income tax by individuals; procedures.**—(a) *"Estimated tax" defined.* For purposes of this Code section, the term "estimated tax" means the amount which the individual estimates as the amount of income tax imposed by Code Section 48-7-20 less the amount which the individual estimates as the sum of credits allowable by law against the tax.

(b) *Requirement of estimated tax.* Except as otherwise provided in subsection (d) of this Code section, every resident individual and every taxable nonresident individual shall file of his estimated tax for the current

taxable year if he can be reasonably expected to be required to file a Georgia income tax return for the current taxable year . . .

\* \* \* \*

**Sec. 48-7-115. Time for filing declarations of estimated income tax by individuals.**—(a) *In general.* Estimated tax required by Code Section 48-7-114 from an individual not regarded as a farmer or fisherman shall be filed with the commissioner on or before April 15 of the taxable year, except that if the requirements of subsection (b) of Code 48-7-114 are first met:

(1) On or after April 1 and before June 1 of the taxable year, the estimated tax shall be filed on or before June 15 of the taxable year;

(2) On or after June 1 and before September 1 of the taxable year, the estimated tax shall be filed on or before September 15 of the taxable year; or

(3) On or after September 1 of the taxable year, the estimated tax shall be filed on or before January 15 of the succeeding year.

\* \* \* \*

**Sec. 48-7-120. Failure by taxpayer to pay estimated income tax.**—(a) *Addition to the tax.* In case of any underpayment of estimated tax by a taxpayer, except as provided in subsection (d) of this Code section, an amount computed at the rate of 9 percent per annum upon the amount of the underpayment, determined under subsection (b) of this Code section, for the period of this underpayment, determined under subsection (c) of this Code section, shall be added to the tax under Code Section 48-7-21 for the taxable year.

\* \* \* \*

(e) *Application to individual.* For purposes of applying this Code section in the case of an individual:

(1) The estimated tax shall be computed without any reduction for the amount which the individual estimates as his credit under subsection (a) of Code Section 48-7-112; and

(2) The amount of the credit allowed under subsection (a) of Code Section 48-7-112 for the taxable year shall be deemed a payment of estimated tax, and an equal part of the amount shall be deemed paid on each installment date as determined under Code Section 48-7-116 for the taxable year. If the taxpayer establishes the dates on which all amounts were actually withheld, the amounts so withheld shall be deemed payments of estimated tax on the dates on which the amounts were actually withheld.

\* \* \* \*

**Sec. 48-7-121. Credit of estimated tax payment; credit or refund of estimated tax overpayment; rate of interest on refund; time.**—(a) The amount of estimated tax paid under this article for any taxable year shall be allowed as a credit to the taxpayer against the taxpayer's income tax liability under Code Section 48-7-20 or 48-7-21 for the taxable year.

(b) To the extent that the estimated tax credit, together with other credits allowed by law, is in excess of the taxpayer's income tax liability for a taxable year as shown on an income tax return filed by the taxpayer for that year, the overpayment shall be considered as taxes erroneously paid and shall be credited or refunded as provided in this subsection. The overpayment shall be credited to the taxpayer's estimated income tax liability for the succeeding taxable year unless the taxpayer claims a refund for the overpayment. The commissioner may consider any final return showing an overpayment as a claim for refund per se. An overpayment shall bear no interest if credit is given for the overpayment. Amounts refunded as overpayments shall bear interest at the rate of 9 percent per annum but only after 90 days from the filing date of

the final return showing the overpayment or 90 days from the due date of the final return, whichever is later.

\* \* \* \*

**Sec. 48-16-12**

\* \* \* \*

(b) In addition to all other penalties provided under this chapter and any other law, any person who willfully fails to make a return or willfully makes a false return or conspires to do so, or who willfully fails to pay taxes owing, withheld, or collected, with intent to evade payment of the tax owed or the amount withheld or collected, or any part thereof, or who conspires to do so shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than three years or by a fine of not more than \$5,000.00, or both.

\* \* \* \*

**48-2-55 Attachment and garnishment; levy.**

(a) All taxes are a personal debt of the person required by this title to file the returns or to pay the taxes imposed by this title.

(b)(1) The commissioner or his authorized representative may attach the property of a delinquent taxpayer on any ground provided by Code Section 18-3-1 or on the ground that the taxpayer is liquidating his property in an effort to avoid payment of the tax.

(2) The commissioner or his authorized representative may use garnishment to collect any tax, fee, license, penalty, interest, or collection costs due the state which are imposed by this title or which the commissioner or the department is responsible for collecting under any other law. Garnishment may be issued by the commissioner or his authorized representative against any person whom he believes to be indebted to the defendant or who has property, money, or effects in his hands belonging to the de-

fendant. The summons of garnishment shall be served by the commissioner or his authorized representative, shall be served at least 15 days before the sitting of the court to which the summons is made returnable, and shall be returned to either the superior court or the state court of the county in which the garnishee is served. The commissioner or his authorized representative shall enter on the execution the names of the persons garnished and shall return the execution to the appropriate court. All subsequent proceedings shall be the same as provided by law regarding garnishments in other cases when judgment has been obtained or execution issued.

(c)(1) In case of neglect or refusal by a taxpayer to pay any taxes, fees, licenses, penalties, interest, or collection costs due the state, the commissioner or his authorized representative may levy upon all property and rights to property belonging to the taxpayer, except such as are exempt by law, for the payment of the amount due, together with interest on the amount, any penalty for nonpayment, and such further amount as shall be sufficient for the fees, costs, and expenses of the levy. As used in this subsection, the term "property and rights to property" includes, but is not limited to, any account in or with a financial institution.